No. 17-1011

IN THE

Supreme Court of the United States

BUDHA ISMAIL JAM, et al.,

Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF INTERNATIONAL LAW EXPERTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

PETER R. SHULTS
FOLEY HOAG LLP
155 Seaport Blvd.
Boston, MA 02210
(617) 832-1739
pshults@foleyhoag.com

LAWRENCE H. MARTIN
Counsel of Record
M. ARSALAN SULEMAN
FOLEY HOAG LLP
1717 K Street, N.W.
Washington, D.C. 20006
(202) 261-7395
LHM@foleyhoag.com

Counsel for Amici Curiae

September 17, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 5

I. INTERNATIONAL ORGANIZATIONS ARE VERY DIFFERENT FROM FOREIGN STATES AND THEREFORE REQUIRE DIFFERENT IMMUNITIES 5

A. International Organizations Cannot Be Analogized to Foreign States 5

B. The Reasons for International Organizational and Foreign Sovereign Immunity Are Fundamentally Different 7

C. The IOIA Gives the President Flexibility to Ensure International Organizations' Functional Immunity 10

II. THE FSIA IS INCOMPATIBLE WITH THE IOIA 13

A. The IOIA and FSIA Have Opposing Structures 13

B. Inserting the FSIA's Immunity Provisions into the IOIA Would Also Create Impossible Interpretive Problems 17

III. PETITIONERS' ARGUMENT IS BASED ON THE FALSE PREMISE THAT THE IOIA CREATES A FIXED RULE OF ABSOLUTE IMMUNITY FOR INTERNATIONAL ORGANIZATIONS 21

A. Petitioners and Supporting *Amici* Fundamentally Misunderstand the IOIA 21

B. The Executive Regularly Acts to Limit International Organizational Privileges and Immunities 22

C. The President Could Create a Commercial Activity Exception Applicable to International Organizations If He Considered It Appropriate 24

IV. THE U.S. POLICY CHANGE TO RESTRICTIVE IMMUNITY FOR FOREIGN SOVEREIGNS RESPONDED TO CHANGES IN INTERNATIONAL LAW THAT HAVE NEVER OCCURRED FOR INTERNATIONAL ORGANIZATIONS 26

A. The Tate Letter Signaled a Change in Foreign Sovereign Immunity Only, Not International Organizational Immunity 26

B. The United States Did Not Change Its Views with Respect to International Organizational Immunity in the Wake of the Tate Letter 28

C. The International Law of International Organizational Immunity Is Fundamentally Different from the Law of Sovereign Immunity 32

V. ADOPTING PETITIONERS' CONSTRUCTION OF THE IOIA WOULD DRAMATICALLY CHANGE U.S. POLICY 34

CONCLUSION 38

APPENDIX: LIST OF *AMICI CURIAE* A-1

TABLE OF AUTHORITIES

CASES

Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335 (D.C. Cir. 1998) 31

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) 19

Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926) 37

Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312 (2017) 32

Jam v. Int'l Finance Corp., 860 F.3d 703 (D.C. Cir. 2017) 1

Jesner v. Arab Bank, 138 S. Ct. 1386 (2018) 37

Kiobel v. Royal Dutch Petro. Co., 569 U.S. 108 (2013) 37

Lutcher S.A. Celulose E Papel v. Inter-Am. Dev. Bank, 382 F.2d 454 (D.C. Cir. 1967) 29

Medellin v. Texas, 552 U.S. 491 (2008) 19, 20

Mendaro v. World Bank, 717 F.2d 610 (D.C. Cir. 1983) 35

Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) 34

OSS Nokalva, Inc. v. Eur. Space Agency, 617 F.3d 756 (3d Cir. 2010) 32

Republic of Arg. v. Weltover, Inc., 504 U.S. 607 (1992) 16

Samantar v. Yousuf, 560 U.S. 305 (2010) 7, 12

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 37

The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) 37

United States v. Melekh, 190 F. Supp. 67 (S.D.N.Y. 1960) 29

Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480 (1983) 7

Wencak v. United Nations, 135 N.Y.L.J. 13 (Sup. Ct. NY. Jan. 19, 1956), *also available at* 23 Int'l L. Rep. 509 ..... 28, 29

FEDERAL STATUTORY AUTHORITIES

22 U.S.C. § 288 ..... passim

22 U.S.C. §§ 288 et seq. ..... passim

22 U.S.C. § 288a(b) 12, 18

22 U.S.C. § 288c 25

28 U.S.C. §§ 1602 *et seq.* ..... passim

28 U.S.C. § 1602 12

28 U.S.C. § 1604 12

28 U.S.C. § 1605 15

28 U.S.C. § 1605(a)(1) 18

28 U.S.C. § 1605(a)(2) 17

28 U.S.C. § 1605A 15

International Organizations Immunities Act, Pub. L. No. 79-291, 59 Stat. 669 (1945) ... 11, 15, 16

EXECUTIVE MATERIALS

Exec. Order No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962) 23

Exec. Order No. 11,227, 30 Fed. Reg. 7369 (June 2, 1965) 23

Exec. Order No. 11,277, 31 Fed. Reg. 6609 (Apr. 30, 1966) 23

Exec. Order No. 11,283, 31 Fed. Reg. 7667 (May 27, 1966) 23

Exec. Order No. 11,318, 31 Fed. Reg. 15,307 (Dec. 5, 1966) 23, 24

Exec. Order No. 11,718, 38 Fed. Reg. 12,797 (May 14, 1973) 23

Exec. Order No. 11,760, 39 Fed. Reg. 2343 (Jan. 17, 1974) 23, 24

Exec. Order No. 12,359, 47 Fed. Reg. 17,791 (Apr. 22, 1982) 23

Exec. Order No. 12,425, 48 Fed. Reg. 28,069 (June 16, 1983) 23, 24

Exec. Order No. 12,467, 49 Fed. Reg. 8229 (Mar. 2, 1984) 23

Exec. Order No. 12,732, 55 Fed. Reg. 46,489 (Oct. 31, 1990) 20

Exec. Order No. 12,986, 61 Fed. Reg. 1693 (Jan. 18, 1996) 23

Exec. Order No. 13,042, 62 Fed. Reg. 18,017 (Apr. 14, 1997) 23, 25

Exec. Order No. 13,367, 69 Fed. Reg. 77,605 (Dec. 21, 2004) 23

Exec. Order No. 13,451, 72 Fed. Reg. 224 (Nov. 21, 2007) 20

Exec. Order No. 13,524, 74 Fed. Reg. 67,803 (Dec. 16, 2009) 23, 24

LEGISLATIVE MATERIALS

91 Cong. Rec. 12,530 (Dec. 21, 1945) 25

H.R. Rep. No. 79-1203 (1945) ..... passim

H.R. Rep. No. 94-1487 (1976) 14

S. Res. 2715, 101st Cong. (1990) 31

S. Exec. Rep. 91-17 (1970) 30

S. Rep. No. 79-861 (1945) ..... passim

S. Rep. No. 94-1310 (1976) 14

OTHER AUTHORITIES

Agreement establishing the International Fund for Agricultural Development, done at Rome, June 13, 1976, entered into force Nov. 30, 1977, 28 U.S.T. 8435 20

Agreement on the establishment of the ITER International Fusion Energy Organization for the Joint Implementation of the ITER project, signed at Paris, Nov. 21, 2006, entered into force Oct. 24, 2007, T.I.A.S. 07-1024 20

Peter H. F. Bekker, *The Legal Position of Intergovernmental Organizations – A Functional Necessity Analysis of Their Legal Status and Immunities* (1994) ..... passim

Brief for the United Nations as *Amicus Curiae, Broadbent v. Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980) (No. 78-1465) 5, 6, 8, 35

Brief of the United States as *Amicus Curiae* in Support of Affirmance, *EM Ltd. v. Republic of Argentina*, 473 F.3d 463 (2d. Cir. 2007) (Nos. 06-0403-cv, 06-0405-cv, 06-0406cv) 31

Brief for United States as Intervenor, *Veiga v. World Meteorological Org.*, 368 Fed. Appx. 189 (2d Cir. 2010) (No. 08-3999-cv) 31

Charles H. Brower, II, *International Immunites: Some Dissident Views on the Role of Municipal Courts*, 41 Va. J. Int'l L. 1 (2001) 18, 33

Convention on the Privileges and Immunities of the United Nations, done at New York, Feb. 13, 1946, entered into force Sept. 17, 1946, entered into force for the United States Apr. 29, 1970, 21 U.S.T. 1418 ..... 19, 29

Diplomatic Privileges (Extension) Act 1944, Geo. 6 c. 44 (Eng.), *reprinted in* 39 Am. J. Int'l L. Sup. 163-67 (1945) 12

Alice Ehrenfeld, *United Nations Immunity Distinguished from Sovereign Immunity*, 52 Am. Soc'y Int'l L. Proc. 88 (1958) 35

Leonardo D. Gonzalez (Special Rapporteur) "Fourth Report on Relations Between States and International Organizations," U.N. Doc. A/CN.4/424, *reprinted in* 1989 Y.B. Int'l L. Comm'n 153, U.N. Doc. A/CN.4SER.A/1989/Add.1 33

Indian Ministry of External Affairs Notification No. D-II/451/12(21)/2009, Gazette of India, pt. II sec. 3(ii) (July 13, 2016) 36

C. W. Jenks, *International Immunities* (1961) 8

Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Phillip B. Perlman, Acting Attorney Gen. (May 19, 1952), *reprinted in* 26 Dep't of State Bull. 984 (1952) 27, 28, 29, 32

Edward C. Okeke, *Jurisdictional Immunities of States and International Organizations* (2018) 6, 33

Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174 (April 11) 6

Reply in Support of Statement of Interest of the United States of America, *Lempert v. Rice*, 956 F. Supp. 2d 17 (D.D.C. 2013) (No. 12-01518) 31

Restatement (Third) of the Foreign Relations Law of the United States (1987) 8, 32, 33

INTEREST OF *AMICI CURIAE*[1]

Amici curiae, legal experts in international law, the law of international organizations ("IOs"), and the law of foreign sovereign immunity, believe that the United States Court of Appeals for the District of Columbia Circuit correctly decided *Jam v. International Finance Corp.*, 860 F.3d 703 (D.C. Cir. 2017), and that the International Organizations Immunities Act ("IOIA"), 22 U.S.C. §§ 288 *et seq.*, does not incorporate the immunity provisions of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 *et seq.* *Amici* believe that this Court should affirm that decision.

Amici have a professional interest in clarifying the law of IO immunities, the relationship between sovereign states and IOs, and the reasons why immunity for IOs is different from immunity for sovereign states.

The appendix includes a full list of *amici*.

SUMMARY OF THE ARGUMENT

Petitioners' attempt to assimilate the immunities from suit and judicial process of IOs with those of foreign states ignores the fundamental differences

---

[1] All parties have consented to the filing of this brief. Supreme Court Rule 37.3(a). Petitioners and Respondent provided blanket consent for all *amicus* briefs on June 27 and July 2, 2018, respectively. No counsel for a party authored any part of this brief, and no person other than *amici* and their counsel contributed financially to the preparation or submission of this brief. *Id.*, Rule 37.6.

between IOs and foreign states. States have sovereign authority, with all the rights and obligations attendant thereto. IOs, in contrast, are creatures of treaty established by their member states for the limited purposes stated in their constituent instruments.

Because they are so different, the reasons for according IOs and foreign states immunity are also different. Foreign sovereign immunity is a matter of grace and comity, and typically extended on the basis of reciprocity. IO immunity, in contrast, is grounded in the need for IOs to be free to carry out the functions for which they were created without interference by member states.

Congress designed the IOIA to ensure IOs' functional immunity. The IOIA expressly gives the President broad power to withhold or withdraw IOs' immunities "in light of the functions performed by any such international organization." 22 U.S.C. § 288.

Petitioners' effort to read the IOIA to incorporate the immunity provisions of the FSIA faces insurmountable barriers. The two acts are structurally incompatible. The IOIA gives the President exclusive authority to determine the extent of IOs' immunity from suit and judicial process. In contrast, the FSIA takes foreign sovereign immunity decisions away from the Executive and gives exclusive power to the Judiciary. Reading the two together would create an unworkable hybrid inconsistent with Congress's delegation of plenary power to the President in the IOIA.

Incorporating the FSIA's immunity provisions into the IOIA would also create grave interpretive problems. The restrictive theory of sovereign immunity turns on the distinction between foreign states' sovereign acts (*acta jure imperii*) and their private acts (*acta jure gestionis*). That distinction is meaningless when applied to IOs. International organizations do not undertake sovereign acts. Rather, they undertake acts in the exercise of their function, many of which have some of the attributes of private acts. Even so, they are not genuinely private acts; they are acts in fulfillment of the mission their member states assign to them.

Petitioners present this Court with a false, binary choice: IOs get absolute immunity or they get FSIA-based immunity. To the extent the IOIA creates a rule of absolute or virtually absolute immunity, it does so only as the default rule. The President may depart from this default rule and withhold or withdraw IOs' immunity in light of the functions they perform. Seven Presidents have exercised this IOIA authority. There is therefore no risk of IOs somehow being uniquely above the law, as Petitioners contend.

The FSIA conforms to generally accepted international standards; the restrictive theory of foreign sovereign immunity is consistent with prevailing international law. In contrast, international law does not recognize the application of the restrictive theory to IOs. General international law accords IOs such privileges and immunities as are necessary to fulfill their purposes. Equating IO immunity to foreign sovereign immunity would put U.S. law at odds with accepted international

standards. It would also put the U.S. in breach of treaty obligations that provide IOs with broader immunities than does the FSIA.

Petitioners' construction, if accepted, would materially change U.S. policy. For over 70 years, IOs have enjoyed immunity from suit and judicial process in U.S. courts. A ruling in favor of Petitioners would not only change this long-standing reality, it would, if followed elsewhere, open the door to unwelcome state interference in the functioning of IOs.

Taking IO immunity decisions away from the President and placing them in the hands of U.S. courts would also lead to a surge in litigation that, like this case, has only a tenuous connection to this country. This is even more true because many IOs are headquartered in the United States. These potential changes raise serious foreign policy concerns that compel caution.

The Court has shown restraint in circumstances raising significantly less sensitive foreign policy concerns than those implicated here. In such circumstances, the Court has deferred to the political branches, which are better placed to balance competing considerations. The Court should do the same now. Whether such wholesale changes to IO immunity law are warranted is a policy decision for Congress and the Executive to make together.

ARGUMENT

I. INTERNATIONAL ORGANIZATIONS ARE VERY DIFFERENT FROM FOREIGN STATES AND THEREFORE REQUIRE DIFFERENT IMMUNITIES

A. International Organizations Cannot Be Analogized to Foreign States

Petitioners' efforts to assimilate IOs' immunity from suit and judicial process to the immunity enjoyed by foreign states proceeds from a false premise. In their view, no material distinction exists between IOs and foreign states: "International organizations are compilations of sovereigns, so the rules governing the latter's amenability to suit ought to govern the former's." Brief for Petitioners at 15. Petitioners are mistaken.

International organizations and foreign states are fundamentally different creatures. Although both have legal personality under international law, states are sovereigns in equality with other states; IOs are not. States have territory and wield exclusive sovereign authority; IOs do not. And states have citizens, economies, and militaries; IOs do not. *See* Brief for the United Nations as *Amicus Curiae* ("U.N. *Broadbent Amicus* Br.") at 12-13, *Broadbent v. Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980) (No. 78-1465).

Unlike foreign states, IOs are creatures of treaties entered into by their member states. They have separate legal personality from their members, and

their purposes, functions, and structure are defined in—and limited by—their constituent instruments. Moreover, no two IOs are the same. Each has its own particular mandate and power appropriate to fulfill its specific purposes and functions. *Id.* at 9-10; *see also* Edward C. Okeke, *Jurisdictional Immunities of States and International Organizations* 234-35 (2018). Moreover, those functions sometimes lie beyond the capacity of any single state or group of states.

When deciding just its third case, the International Court of Justice opined that the United Nations was an "international person," thereby recognizing IOs as subjects of international law alongside sovereign states. *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J., 174, 179 (Apr. 11). It explained, however, that

> [t]hat is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. . . . Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.

Id.

Given the profound differences between IOs and foreign states, Petitioners' attempt to conflate the

privileges and immunities that these different subjects of international law enjoy is inherently flawed. Indeed, "[i]t must be stressed that the law of organizational immunities, concerning immunities granted to international organizations as such, is a separate body of law, quite distinct from the law of sovereign and diplomatic immunity by reason of the special nature of international organizations." Peter H.F. Bekker, *The Legal Position of Intergovernmental Organizations—A Functional Necessity Analysis of Their Legal Status and Immunities* 149 (1994).

B. The Reasons for International Organizational and Foreign Sovereign Immunity Are Fundamentally Different

Because IOs and sovereign states are so different, the reasons for granting them immunity are also very different.

Traditionally, foreign sovereign immunity has been recognized as an attribute of sovereignty and extended for reasons of reciprocity. "The doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976." *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). That recognition of immunity at common law was extended to foreign sovereigns as "a matter of grace and comity." *Id.* (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)).

Unlike IOs, foreign states are able to protect themselves from undue interference from other states. They can, for example, condition sovereign

immunity on reciprocity or protect themselves through other retaliatory measures. U.N. *Broadbent Amicus* Br. at 12-13.

The reasons for granting IOs immunity are different and essentially functional. For IOs to fulfill the purposes for which member states created them, states have recognized the need to accord IOs such privileges and immunities as are necessary to achieve those purposes. International law therefore accords IOs "such privileges and immunities from the jurisdiction of a member state as are necessary for the fulfillment of the purpose of the organization, including immunity from legal process, and from financial controls, taxes, and duties." *Restatement (Third) of the Foreign Relations Law of the United States* § 467(1) (1987).

IOs' need for functional immunity is tied to their need for independence from their member states. IOs' constituent treaties typically define each member's influence within the organization, and how that influence is to be exerted—usually through collective organs. If individual members could exert additional influence by, for example, subjecting IOs to suits that target their activities, their independence and the ability to achieve their purposes could be compromised. As one scholar long-ago observed, "jurisdictional immunity is a necessary bulwark of the independence of international organisations and an essential safeguard for their opportunities of further growth." Jenks, C.W., *International Immunities* 41 (1961); *see also* Bekker, *supra*, at 99-103.

Congress was aware of these concerns when it

enacted the IOIA. The legislative history shows that Congress wanted to protect the independence and facilitate the work of IOs operating in the United States. The Senate report states: "[P]assage of this bill at this time would be an important indication of the desire of the United States to *facilitate fully the functioning* of international organizations in this country." S. Rep. No. 79-861, at 2-3 (1945) (emphasis added).

Amici Curiae Professors of International Organization and International Law in Support of Petitioners ("Petitioners' *Amici* Professors") themselves point to the United States' desire to secure IOs' functional immunity around the time of the IOIA's enactment:

> In 1944 and 1945, with the end of World War II in view, U.S. diplomats and lawyers were laying the foundational architecture for a new generation of IOs and new approaches to their privileges and immunities. In negotiating the articles of agreement for the International Monetary Fund and the International Bank for Reconstruction and Development (World Bank) in 1944 at the Bretton Woods conference, the United States took distinctly different approaches to the privileges and immunities of these two new bodies, *tailoring them to the bodies' different functions*. . . . The UN Charter negotiated in San Francisco in June 1945 indicated that the Organization would "enjoy in the territory of each of its Members *such privileges and immunities as are necessary for the fulfillment of its*

purposes."

Brief of Petitioners' *Amici* Professors at 10-11 (emphasis added) (footnotes omitted).[2]

Petitioners are therefore wrong to claim that "a foreign state should be treated the same in U.S. courts whether it acts on its own or through an organization it helped to create." Brief for Petitioners at 32. When a state acts on its own, it does so as a sovereign with all the rights and prerogatives sovereigns enjoy. But when a state joins an IO, it does so as one among many members and then only to advance the mission of the IO it is joining. Moreover, as a separate legal person under international law, the IO itself acts in accordance with its functions and founding charter. The member states are not the actors. There is therefore every reason to continue treating foreign states and IOs differently in U.S. courts.

C. The IOIA Gives the President Flexibility to Ensure International Organizations' Functional Immunity

The text and scheme of the IOIA reflect Congress's desire to ensure IOs' functional immunity. The text could scarcely be clearer:

> The President shall be authorized, *in light of the functions performed by any such*

---

[2] The Table of Authorities included in the Brief of Petitioners' *Amici* Professors lists no writings regarding IO immunities or the IOIA by any of the *Amici* Professors and omits references to important standard works on IO immunities of recent date.

> *international organization*, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this title (including the amendments made by this title) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity.

IOIA, Pub. L. No. 79-291, § 1, 59 Stat. 669, 669-73 (1945) (emphasis added); *see* 22 U.S.C. § 288.[3]

When it granted the President the authority to withhold and withdraw privileges and immunities from IOs, Congress thus contemplated that the President's actions would be guided by "the functions performed by any such international organization." In other words, Congress granted the President the authority to withhold or withdraw the privileges and immunities of any particular IO if he or she deems them unnecessary to facilitating the functions of that IO. *See infra* § III.B.

The question then becomes: what is the scope of the default "privileges, exemptions, and immunities provided for in" the IOIA that the President is empowered to withhold or withdraw? As regards the immunity from suit and judicial process, Section 2(b) of the IOIA provides the answer: IOs "shall enjoy the same immunity from suit and every form of judicial

---

[3] Twenty-two U.S.C. § 288 uses the phrase "this subchapter" instead of "this title."

process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b).

Petitioners take the view that under the so-called "reference canon," this language imports the FSIA's immunity rules governing foreign states. Brief for Petitioners at 15-17, 26-37. Respondent ably rebuts Petitioners' core contention. Brief for Respondent at 25-30. *Amici* will not repeat those arguments. *Amici* add only that in their view, the language of Section 2(b) was intended to capture the then-prevailing default rule of foreign sovereign immunity, *i.e.*, virtually absolute immunity. *Samantar,* 560 U.S. at 311. Congress was simply stating that IOs, like foreign states, enjoy immunity from suit, except to the extent the President may decide otherwise pursuant to his authority to withhold or withdraw that immunity.

The legislative history supports this reading. Congress expressly noted the growing contemporaneous precedent of foreign states providing IOs with absolute immunity, including examples from Switzerland, the United Kingdom, Canada, and The Netherlands. S. Rep. No. 79-861, at 3; H. Rep. No. 79-1203, at 3. The British legislation, which the House and Senate Reports describe as "substantially similar in conception and content" to the IOIA, *id.*, grants IOs absolute immunity from suit and legal process. Diplomatic Privileges (Extension) Act 1944, 7 & 8 Geo. 6 c. 44 (Eng.), *reprinted in* 39 Am. J. Int'l L. Sup 163-67 (1945). Relying on these examples, Congress concluded that the IOIA immunities "are standard in the light of available precedents." S. Rep. No. 79-861, at 3; H. Rep. No. 79-

1203, at 3.

Moreover, as Respondent explains, the IOIA's drafting history shows that Congress treated the phrase "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments" as substantially equivalent to the phrase "immunity from suit and every form of judicial process." Brief for Respondent at 36.

II. THE FSIA IS INCOMPATIBLE WITH THE IOIA

A. The IOIA and FSIA Have Opposing Structures

Petitioners see no structural or interpretive impediments to incorporating the immunity provisions of the FSIA into the IOIA. Indeed, they claim that the IOIA's structure "reinforces" their argument that the IOIA incorporates the FSIA. Brief for Petitioners at 26-31. Petitioners' *Amici* Professors likewise assert that incorporating the FSIA into the IOIA "produces a coherent, workable approach to IO immunity." Brief of Petitioners' *Amici* Professors at 19-20. Petitioners and Petitioners' *Amici* Professors could not be more wrong.

The FSIA and IOIA are incompatible. The IOIA gives the President plenary authority to designate "through appropriate Executive order" IOs that are entitled to enjoy the IOIA's "privileges, exemptions, and immunities." 22 U.S.C. § 288. It also gives the President broad power, "in the light of the functions performed by any such international organization . . . to withhold or withdraw from any such organization or its officers or employees any of the

privileges, exemptions, and immunities provided for in this [title]." *Id.* The legislative history makes clear that Congress drafted the IOIA this way to give the President "broad powers" that would "permit prompt action" in withholding or withdrawing immunities for IOs. S. Rep. No. 79-861, at 4; H. Rep. No. 79-1203, at 6. The IOIA is thus structured to give the President the ultimate authority to decide whether and to what extent IOs receive immunity.

The IOIA's deference to Presidential authority is broadly consistent with the governing approach to foreign sovereign immunity decisions in 1945. At that time and for 31 years thereafter, sovereign immunity decisions rested with the Executive. Petitioners and Petitioners' *Amici* Professors admit the point. *See* Brief for Petitioners at 40; Brief of Petitioners' *Amici* Professors at 19-20.

The FSIA adopts an entirely different approach. It was enacted precisely to remove sovereign immunity decisions from the Executive. A "principal purpose" of the law was to "transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process." H.R. Rep. No. 94-1487, at 7 (1976); S. Rep. No. 94-1310, at 9 (1976).

This is reflected in the first section of the FSIA, captioned "Findings and declaration of purpose," which provides in part: "The Congress finds that *the determination by United States courts of the claims*

of foreign states to immunity from the jurisdiction of courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts." 28 U.S.C. § 1602 (emphasis added).

The IOIA is structured to give the President plenary power to determine IOs' immunity. The FSIA, in contrast, strips the Executive of its former power and turns the issue over exclusively to the Judiciary. Reading the two together would create an impracticable hybrid whereby issues of IO immunity would be subject first to Presidential determination and then, secondarily, to judicial review. This awkward, two-branch review is incompatible with Congress's determination to give the President "broad powers" to make IO immunity decisions.

It would also lead to absurd results. As stated, the IOIA gives the President the power "to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this title." IOIA § 1, 59 Stat. at 669; *see* 22 U.S.C. § 288. But the FSIA also lifts foreign states' immunity from suit in those areas covered by the exceptions in Sections 1605 and 1605A. That being the case, if the FSIA were deemed incorporated into the IOIA, it is hard to see what meaningful areas of immunity would be left for the President to withhold or withdraw.

This is particularly true given that the realms in which the FSIA was designed to *preserve* foreign states' immunity relate to their *acta jure imperii*, or sovereign acts (versus their *acta jure gestionis*, or

private/commercial acts). *See, e.g., Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 612-14 (1992). Yet, because they are not sovereign, IOs by definition do not engage in sovereign acts. *See* Bekker, *supra*, at 156-58. Reading the FSIA into the IOIA would therefore leave IOs with few if any meaningful immunities. The President therefore would be effectively stripped of the authority to withhold or withdraw IOs' immunity that the IOIA explicitly gives him.

Another problem exists because the IOIA is a one-way street: it only allows the President to narrow the immunities of designated IOs, not expand them. *See* 22 U.S.C. § 288. If the FSIA's immunity provisions were incorporated into the IOIA, the President would be without authority to accord IOs broader immunities than the FSIA allows. This would severely constrain the President's power to determine the extent of an IO's immunity "in the light of the functions performed by any such international organization." *Id.* What if, for example, the President determined that an IO's functions required that it be excepted from the FSIA's immunity exceptions? On Petitioners' case, the President would be impotent. This cannot be the result Congress intended.

Further still, the plain text of the IOIA indicates that Congress did not contemplate that any amendments thereto would come from outside the statute. The IOIA states that the President may withhold or withdraw any of "the privileges, exemptions, and immunities provided for in this title (including the *amendments made by this title*)." § 1, 59 Stat. at 669 (emphasis added); *see* 22 U.S.C. § 288.

By its terms, Congress thus contemplated that any amendments to the IOIA would be made to the statute itself, not imported from without by implication.

The legislative history confirms this interpretation. Congress intended to set "forth *in one place* all of the specific privileges which international organizations will enjoy." S. Rep. No. 79-861, at 3 (emphasis added); H. Rep. No. 79-1203, at 6 (emphasis added). Reading the FSIA into the IOIA would mean that the privileges IOs enjoy would be found in two different places.

B. Inserting the FSIA's Immunity Provisions into the IOIA Would Also Create Impossible Interpretive Problems

Incorporating the FSIA's immunity provisions into the IOIA would create other interpretive problems. Petitioners' central argument is that the FSIA's commercial activity exception, 28 U.S.C. § 1605(a)(2), should apply also to IOs. Brief for Petitioners at 2.

As stated, the FSIA's commercial activity exception is premised on the distinction between states' sovereign acts and their private acts. But this distinction is meaningless in the case of IOs. International organizations do not undertake sovereign acts in the true meaning of that phrase. Instead, they undertake acts in the exercise of their functions. Some of those acts may have attributes of private acts—loans to development projects, for example—but they are not genuinely private or commercial acts. Rather, they are acts in fulfillment

of the mission assigned to them by their member states, many of which private citizens operating in the free market could not do.

Because the case law interpreting the scope of the FSIA's commercial activity exception developed against the backdrop of the *acta jure imperii*/*acta jure gestionis* distinction, and because that distinction does not apply to IOs, the existing jurisprudence is a poor fit for assessing the activities of IOs. *See* Charles H. Brower, II, *International Immunities: Some Dissident Views on the Role of Municipal Courts*, 41 Va. J. Int'l L. 1, 7, 16 (2001) ("Leading writers have rejected the wholesale application of sovereign immunity concepts to international organizations, which do not possess the traditional attributes of states."); *see also* Bekker, *supra*, at 156. An unthinking application of that jurisprudence could jeopardize the functions and independence of IOs, precisely those things the IOIA was designed to protect.

Additionally, under the IOIA, IOs may only waive immunity "expressly." 22 U.S.C. § 288a(b). Yet the FSIA allows foreign states to waive their immunity "either explicitly or by implication." 28 U.S.C. § 1605(a)(1). If the IOIA were read to incorporate the FSIA's immunity rules, the two provisions would be in open conflict. Nothing in Petitioners' brief suggests any way to reconcile the two.

In addition, merging the two statutes would put the United States in violation of its obligations under both conventional and customary international law. The treaties that create IOs often contain immunity

provisions, as do other treaties dealing exclusively with IO immunity. *See, e.g.*, Convention on the Privileges and Immunities of the United Nations ("Convention on Privileges and Immunities"), done at New York, Feb. 13, 1946, entered into force Sept. 17, 1946, entered into force for the United States Apr. 29, 1970, 21 U.S.T. 1418. Petitioners' *Amici* Professors see no potential for conflict. They claim: "The application of the immunity principles codified in the FSIA to IOs would preserve and prioritize those U.S. obligations under international agreements that grant higher (or lower) levels of immunity than specified in the FSIA to certain IOs." Brief of Petitioners' *Amici* Professors at 27.

Petitioners' *Amici* Professors rely on Section 1604 of the FSIA, which provides that the FSIA's immunity provisions are only "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act [i.e., October 21, 1976]." 28 U.S.C. § 1604. Even if this provision does eliminate the potential for conflict with treaties to which the United States was a party before October 1976,[4] it does not alleviate the potential for conflict with later agreements or U.S. obligations under

---

[4] Because the FSIA's immunity provisions can only be overcome by an international agreement that "expressly conflicts" with the FSIA, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442-43 (1989), non-self-executing agreements that predate the FSIA, provide for IO immunities, and to which the United States is a party also may not supersede the FSIA. *See Medellin v. Texas*, 552 U.S. 491, 505 ("When . . . treaty stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect." (quotation marks and brackets omitted)).

customary international law. If the IOIA were to incorporate the FSIA's immunity provisions, the IOIA would violate any non-self-executing treaties entered into by the United States after October 1976 that provide different immunities for IOs than does the FSIA and are not accompanied by implementing legislation.[5] *See, e.g.*, *Medellin v. Texas*, 552 U.S. 491, 504-05 (2008).

When adopting the IOIA, Congress was aware that many of the treaties that created IOs would include provisions regarding privileges and immunities. *See* S. Rep. No. 79-861, at 2; H. Rep. No. 79-1203, at 2 ("Provisions have been made with respect to the problem of privileges and immunities in the international conferences in connection with the creation of UNRRA, the International Monetary Fund and International Bank, the Food and Agriculture Organization of the United Nations, and others."). For that reason, no provisions of the IOIA conflict with

---

[5] *Compare* Exec. Order No. 13,451, 72 Fed. Reg. 224 (Nov. 21, 2007) (designating the International Fusion Energy Organization as an IO), *and* Exec. Order No. 12,732, 55 Fed. Reg. 46,489 (Oct. 31, 1990) (designating the International Fund for Agricultural Development as an IO), *with* Agreement on the establishment of the ITER International Fusion Energy Organization for the Joint Implementation of the ITER project art. 12, signed at Paris, Nov. 21, 2006, entered into force Oct. 24, 2007, T.I.A.S. 07-1024 (providing for different immunity protections for the International Fusion Energy Organization than those that the FSIA provides), *and* Agreement establishing the International Fund for Agricultural Development art. 10 § 2, done at Rome, June 13, 1976, entered into force Nov. 30, 1977, 28 U.S.T. 8435 (providing stronger immunities for the International Fund for Agricultural Development than the FSIA provides).

U.S. treaty obligations, past or present. Reading the FSIA into the IOIA would destroy that legislative elegance.

III. PETITIONERS' ARGUMENT IS BASED ON THE FALSE PREMISE THAT THE IOIA CREATES A FIXED RULE OF ABSOLUTE IMMUNITY FOR INTERNATIONAL ORGANIZATIONS

A. Petitioners and Supporting *Amici* Fundamentally Misunderstand the IOIA

Petitioners and their *Amici* make another basic mistake in their understanding of the IOIA. They argue that the Court's choice is binary: either IOs get absolute immunity or they get FSIA-based immunity. The choice is false.

Petitioners argue, for example, "[t]he D.C. Circuit is incorrect that the IOIA gives international organizations absolute immunity from suit. Rather, by its plain terms, the IOIA tracks the rules established in the FSIA." Brief for Petitioners at 14. Presenting the issue this way may make Petitioners' argument seem more appealing, but it belies a profound misunderstanding of the IOIA and immunities enjoyed by IOs under international law.

The IOIA does not "fr[ee]ze a rule of absolute immunity for IOs as of 1945," as Petitioners' *Amici* Professors suggest. *Id.* at 15; *see also id.* at 15, 20 (Respondent's construction would "enshrin[e] a fixed rule for all time"); Brief for Petitioners at 8, 21. To the contrary, the IOIA recognizes that IOs, as creatures of multilateral treaties created for specific purposes,

may require different levels of immunity depending on their functions. Thus, the IOIA authorizes the President to decide (1) which IOs are entitled to receive privileges and immunities and (2) the extent of those privileges and immunities in light of the IOs' functions. 22 U.S.C. § 288. The extent of IO immunity is thus entirely within the President's control.

Put simply, to the extent the IOIA sets a rule of "absolute" immunity, it does so only as the default rule. But the IOIA also gives the President plenary authority to depart from this default rule and narrow IOs' immunity at any time he considers it appropriate. There is therefore no question of IOs having a "right to be uniquely above the law," as Petitioners melodramatically put it. Brief for Petitioners at 33. To the contrary, the IOIA puts IOs squarely within the law's reach. All that is required is Executive action.

B. The Executive Regularly Acts to Limit International Organizational Privileges and Immunities

The President has regularly exercised his IOIA authority to limit IOs' privileges and immunities, in light of the particular functions of that IO or group of IOs.

Since the adoption of the IOIA, seven different Presidents (Kennedy, Johnson, Nixon, Reagan, Clinton, G.W. Bush, and Obama) have, on at least 16 occasions, exercised their IOIA authority to limit or

amend limitations on the immunities of IOs.[6] In eight out of 14 of those Executive Orders, the President withheld full or partial immunity from suit and judicial process for the IO, or part of the IO, in question.[7] On two occasions, the President conferred

---

[6] Exec. Order No. 13,524, 74 Fed. Reg. 67,803 (Dec. 16, 2009) (Interpol); Exec. Order No. 13,367, 69 Fed. Reg. 77,605 (Dec. 21, 2004) (U.S.-Mexico Border Health Comm'n); Exec. Order No. 13,042, 62 Fed. Reg. 18,017 (Apr. 14, 1997) (World Trade Org.); Exec. Order No. 12,986, 61 Fed. Reg. 1693 (Jan. 18, 1996) (Int'l Union for Conservation of Nature and Natural Res.); Exec. Order No. 12,467, 49 Fed. Reg. 8229 (Mar. 2, 1984) (Int'l Boundary and Water Comm'n); Exec. Order No. 12,425, 48 Fed. Reg. 28,069 (June 16, 1983) (Interpol, superseded by later Executive Order No. 13,524); Exec. Order No. 12,359, 47 Fed. Reg. 17,791 (Apr. 22, 1982) (Int'l Food Policy Research Inst.); Exec. Order No. 11,760, 39 Fed. Reg. 2343 (Jan. 17, 1974) (European Space Research Org.); Exec. Order No. 11,718, 38 Fed. Reg. 12,797 (May 14, 1973) (INTELSAT); Exec. Order No. 11,283, 31 Fed. Reg. 7667 (May 27, 1966) (Int'l Cotton Inst.); Exec. Order No. 11,277, 31 Fed. Reg. 6609 (Apr. 30, 1966) (Int'l Telecommunications Satellites Consortium); Exec. Order No. 11,318, 31 Fed. Reg. 15,307 (Dec. 5, 1966) (European Space Research Org., superseded by later Exec. Order No. 11,760); Exec. Order No. 11,227, 30 Fed. Reg. 7369 (June 2, 1965) (Interim Communications Satellite Comm.); Exec. Order No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962) (Int'l Pacific Halibut Comm'n, Great Lakes Fisheries Comm'n, Inter-American Tropical Tuna Comm'n).

[7] Exec. Order No. 13,367 (U.S.-Mexico Border Health Comm'n); Exec. Order No. 12,986 (Int'l Union for Conservation of Nature and Natural Res.); Exec. Order No. 12,467 (Int'l Boundary and Water Comm'n); Exec. Order No. 12,359 (Int'l Food Policy Research Inst.); Exec. Order No. 11,718 (INTELSAT); Exec. Order No. 11,283 (Int'l Cotton Inst.); Exec. Order No. 11,277 (Int'l Telecommunications Satellites Consortium); Exec. Order No. 11,227 (Interim Communications Satellite Comm.).

immunities that had been limited by a previous President.[8]

This practice demonstrates the efficacy, flexibility, and wisdom of the IOIA's system of providing for and enforcing functional immunity for IOs. The fact that Presidents routinely exercise their authority under the IOIA further reinforces the conclusion that Congress set a default rule of "immunity from suit and every form of judicial process" but allowed the President to limit that immunity if the functions of the IO so demand.

C. The President Could Create a Commercial Activity Exception Applicable to International Organizations If He Considered It Appropriate

Rather than trying to shoe-horn immunities derived from the FSIA into the IOIA, a far simpler means is available to limit an IOs' immunity when it engages in commercial activities outside the scope of its functions. The President could simply issue an Executive Order so providing.

Indeed, Congress contemplated just this possibility. According to the Senate report, Congress explicitly recognized that "[t]his provision [*i.e.*, Section 1 of the IOIA] will permit the adjustment or

---

[8] Exec. Order No. 13,524 (Interpol); Exec. Order No. 12,425 (Interpol, superseded by later Executive Order No. 13,524); Exec. Order No. 11,760 (European Space Research Org.); Exec. Order No. 11,318 (European Space Research Org., superseded by later Exec. Order No. 11,760).

limitation of the privileges in the event that any international organization should engage, for example, in *activities of a commercial nature*." S. Rep. No. 79-861 at 2 (emphasis added); *see also* 91 Cong. Rec. 12,530 (1945) (House debate confirming that Section 1 addresses situations where an IO or its officer "starts into business over here" or "open[s] up a shipping business" or "engage[s] in other business here").

As stated, Presidents have on eight occasions withheld partial or full immunity from suit and judicial process from designated IOs. They have also withheld other IOIA immunities to deter certain forms of commercial activity. When designating the World Trade Organization an IO, for example, President Clinton withheld immunity from property taxes under IOIA Section 6, 22 U.S.C. § 288c, for any "property, or that portion of property, that is not used for the purposes of the World Trade Organization." Exec. Order No. 13,042. The Executive Order further specified:

> The leasing or renting by the World Trade Organization of its property to another entity or person to generate revenue *shall not be considered a use for the purposes of the World Trade Organization*. Whether property or portions thereof are used *for the purposes* of the World Trade Organization shall be determined within the sole discretion of the Secretary of State or the Secretary's designee.

Id. (emphases added).

This shows that the discretion and flexibility granted to the President under the IOIA allows the Executive to make appropriate immunities determinations for each particular IO to ensure that it only engages in the functions for which it was created. It also provides a further demonstration that the choice between absolute and FSIA-based immunity that Petitioners offer the Court is pure fiction.

When Petitioners and Petitioners' *Amici* Professors warn that foreign states could "evade legal accountability," Brief for Petitioners at 15, or "circumvent the FSIA," Brief of Petitioners' *Amici* Professors at 20, by engaging in commerce through an IO, they betray a misunderstanding of the differences between IOs and foreign states, *see supra* § I.A., and a complete ignorance of the built-in checks on such abuse within the IOIA. Such a theoretical, insidious IO would fail to meet the IOIA's definition of an IO, as it would be implausible to imagine the United States joining it and participating in a fraud upon itself. But even assuming that the U.S. is duped into joining this "Manchurian" IO, once the commercial-type activity becomes apparent, the President is able to withdraw that IO's immunities or revoke its designation under the IOIA.

IV. THE U.S. POLICY CHANGE TO RESTRICTIVE IMMUNITY FOR FOREIGN SOVEREIGNS RESPONDED TO CHANGES IN INTERNATIONAL LAW THAT HAVE NEVER OCCURRED FOR INTERNATIONAL ORGANIZATIONS

A. The Tate Letter Signaled a Change in Foreign Sovereign Immunity Only, Not International Organizational Immunity

Petitioners' *Amici* Professors correctly state that the 1952 Tate Letter marked a "definitive shift to the restrictive theory [of sovereign immunity] as a matter of Executive policy." Brief of Petitioners' *Amici* Professors at 17. No reason exists, however, to believe this change was intended to affect the immunity of IOs. Indeed, there is every reason to think it was not.

The Tate Letter explains the U.S. rationale for adopting the restrictive approach. It speaks of the State Department's study of long-developing changes in international practice concerning sovereign immunity in favor of the restrictive theory. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Phillip B. Perlman, Acting Attorney Gen. (May 19, 1952), *reprinted in* 26 Dep't of State Bull. 984, 984-85 (1952) ("Tate Letter"). It then examines in detail that practice across a range of jurisdictions around the world. *Id.* The analysis says nothing about IOs.

Moreover, the three policy justifications the Tate Letter offers for the restrictive approach to sovereign immunity have no application to IOs. First, the Tate Letter states that perhaps the "most persuasive" reason for the change is to deprive "state trading countries" like the Soviet Union of the advantages of absolute immunity. Tate Letter at 985. In other words, the United States wanted to prevent the Soviet Union from abusing sovereign immunity for economic gain. IOs do not participate in inter-state economic

competition; rather, they rely on their functional immunity for protection from local biases and influences when exercising their functions.

The second policy justification is reciprocity. Given that the United States was subjecting itself to suit in tort and contract in foreign jurisdictions, it was sensible to give them the same treatment in U.S. courts. Such reciprocity has no application in the IO context. *See supra* § I.A.

Finally, the Tate Letter notes "the widespread and increasing practice on the part of governments of engaging in commercial activities." Tate Letter at 985. Again, that practice was applicable only to states, not IOs, whose role on the international stage was beginning to take shape after World War II.

B. The United States Did Not Change Its Views with Respect to International Organizational Immunity in the Wake of the Tate Letter

On Petitioners' theory of the case, the Tate Letter's announcement of the change in U.S. policy regarding foreign sovereign immunity should have applied equally to IO immunity. Petitioners' *Amici* Professors try to explain this issue away by claiming that "no occasion arose for testing the applicability of the Tate Letter principles to [international organizations] between 1952 and 1976." Brief of Petitioners' *Amici* Professors at 19. That is not true.

A number of cases indicate that the Tate Letter had no effect on IOs. In *Wencak v. United Nations*, 135 N.Y.L.J.13, at 6, col. 7, (Sup. Ct. NY. Jan. 19, 1956), *also available at* 23 Int'l L. Rep. 509, the

plaintiff sued the U.N. due to an accident involving the U.N. Relief and Rehabilitation Administration. The U.N. moved to dismiss, arguing that it was immune from suit under the IOIA. *Id.* The plaintiff contended, and the court accepted, that "there is a different theory of *sovereign* immunity to-day [*i.e.*, in 1956] than existed some years ago." *Id.* (emphasis added). Nevertheless, the court explained that immunity was a "political rather than a legal question" that was to be decided by "the Department of State rather than the courts," *id.*, and granted the U.N.'s motion to dismiss because the Department of State had "indicated no limitation of the immunity to be conferred" on the U.N. *Id.*

Similarly, between the 1952 Tate Letter and the 1976 FSIA, at least two other U.S. courts stated that the IOIA preserved absolute immunity for IOs, subject to waiver and the President's discretion. *See United States v. Melekh*, 190 F. Supp. 67, 79-80 (S.D.N.Y. 1960); *see also Lutcher S.A. Celulose E Papel v. Inter-Am. Dev. Bank*, 382 F.2d 454, 456 (D.C. Cir. 1967).

The Executive and Legislative Branches also made clear on other occasions that the U.S. policy change to restrictive immunity for foreign states did not affect the nature of IOs' immunity. For example, the Convention on the Privileges and Immunities provides "immunity from every form of legal process" for the "United Nations, its property and assets wherever located and by whomsoever held" except when the United Nations has expressly waived its immunity. Convention on Privileges and Immunities art. II, § 2. The Convention was signed in 1946 and

was presented to Congress for action in 1949 but was not ratified by the United States until 1970.

The 1970 Senate Report in favor of ratification explains that "[t]he 20-year delay between requests for action appears to have been the result of the executive branch being content to operate under the provisions of the [IOIA] and the Headquarters Agreement [between the United States and the U.N.]." S. Exec. Rep. 91-17, at 2 (1970). The Report also states that "the [IOIA] already provides for *the same legal capacities, privileges, and immunities*" for the U.N. as does the Convention on Privileges and Immunities. *Id.* at 3 (emphasis added).

The U.S. Permanent Representative to the U.N. similarly explained that "[m]any of the privileges and immunities" that the Convention provides "*are already enjoyed under the International Organizations and Immunities Act.*" *Id.* at 8 (Statement of Charles W. Yost, U.S. Permanent Representative to the U.N.) (emphasis added). The State Department Legal Adviser likewise stated: "With respect to the United Nations itself, there is no significant change. *Substantially all the privileges and immunities which are granted by the proposed convention are already given by* the headquarters agreement of 1947 and *the International Organizations Immunities Act of 1945.*" *Id.* at 10 (Statement of Hon. John R. Stevenson, Legal Adviser, Dep't of State) (emphases added).

These statements that the IOIA accords the U.N. "the same legal capacities, privileges, and immunities" as does the Convention on Privileges and Immunities (which in turn provides for absolute immunity from "every form of legal process") prove that the U.S. Government did not consider that the policy change to restrictive immunity for foreign states had any effect on the immunity of IOs.[9]

---

[9] Petitioners' *Amici* Professors are also incorrect that the "[c]onsistent U.S. [p]osition" after FSIA adoption was that the FSIA's immunity provisions were incorporated into the IOIA. *See* Brief of Petitioners' *Amici* Professors at 22-27. While parts of the Executive Branch have at times written in favor of FSIA incorporation into the IOIA, at other times the Executive Branch has asserted that IOs are entitled to absolute immunity. *See, e.g.*, Brief of the United States as *Amicus Curiae* in Support of Affirmance at 17 & n. *, *EM Ltd. v. Republic of Argentina*, 473 F.3d 463 (2d. Cir. 2007) (No. 06-0403-cv, 06-0405-cv, 06-0406-cv) (citing *Atkinson v Inter-Am. Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998) approvingly for the proposition that "the [IOIA] provides for absolute immunity of covered organizations"). *See also* Reply in Support of Statement of Interest of the United States of America at 7, *Lempert v. Rice*, 956 F.Supp.2d 17 (D.D.C. 2013) (No. 12-01518) (citing *Atkinson* for the proposition that "the IOIA does not incorporate a commercial activities exception"). Similarly, the Brief for United States as Intervenor at 16, *Veiga v. World Meteorological Org.*, 368 Fed. App'x 189 (2d Cir. 2010) (No. 08-3999-cv), cites the D.C. Circuit's interpretation of the IOIA approvingly and states that it is the "authority of the political branches to define and confer immunities" to IOs, which would not be true if the IOIA incorporated the FSIA's immunity provisions.

Further, legislation was introduced (but not passed) in the 101st Congress to amend the IOIA to make IO immunity equivalent to foreign sovereign immunity under the FSIA. *See* S. Res. 2715, 101st Cong. (1990). This indicates: (1) that members of Congress did not consider the FSIA's immunity rules to already have been

C. The International Law of International Organizational Immunity Is Fundamentally Different from the Law of Sovereign Immunity

This Court has recognized that the enactment of the FSIA, like the Tate Latter before it, "embodies basic principles of international law long followed both in the United States and elsewhere." *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017); *see also id.* at 1320 (noting that the State Department told Congress that "the Act was 'drafted keeping in mind what we believe to be the general state of the law internationally, so that we conform fairly closely . . . to our accepted international standards'" (citation omitted)).

While international law has coalesced around a general acceptance of the theory of restrictive immunity for foreign states, the same is not true for the law of IO immunity. Indeed, international law dictates an entirely different approach to IO immunity. Except only for the Third Circuit's decision in *OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756 (3d Cir. 2010), *amici* are aware of *no* example in practice or doctrine where the rules of IO immunity are assimilated to the rules of sovereign immunity.

According to the *Restatement (Third) of the Foreign Relations Law of the United States*, under international law IOs enjoy "such privileges and immunities from the jurisdiction of a member state as

---

imported into the IOIA; and (2) that Congress declined to extend the FSIA rules to IOs.

are necessary for the fulfillment of the purpose of the organization, including immunity from legal process, and from financial controls, taxes, and duties." § 467(1). That position appears to be "universally accepted" among scholars in the field. Bekker, *supra*, at 111.

Some observe that this international practice, as reflected in treaties, conventions, and headquarters agreements, generally recognizes IOs' immunity from suit and judicial process unless they waive it. *See, e.g.*, Leonardo D. Gonzalez (Special Rapporteur), "Fourth Report on Relations Between States and International Organizations," U.N. Doc. A/CN.4/424, *reprinted in* 1989 Y.B. Int'l L. Comm'n 153, 161, U.N. Doc. A/CN.4/SER.A/1989/Add.1; Brower, II, *supra*, at 5; Bekker, *supra*, at 111-12. And studies into domestic legislation "reveal[] an international consensus on functional organizational immunities" for IOs. Bekker, *supra*, at 144.

Thus, some scholars have observed "that from the existing instruments and practice a *general rule or principle of international institutional* law has emerged, in the form of the maxim *ne impediatur officia*, . . . that international organizations are entitled to such privileges and immunities as are strictly necessary for the unhampered exercise of functions in the fulfillment of the purposes for which they were created." *Id.* at 151. Moreover, "[w]here a host State is a member of the international organization, even in the absence of a treaty, some courts have upheld the immunity of the international organization as a matter of customary international law." Okeke, *supra*, at 277 (citing decisions from

Italian and Dutch courts).

Interpreting the IOIA to incorporate the immunity rules of the FSIA is therefore inconsistent with the international law of IO immunity and thus violates one of the longest-standing canons of American jurisprudence: the *Charming Betsy* canon. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

This problem can easily be avoided by interpreting the IOIA as written in light of its legislative history and historical context. So understood, the IOIA sets a default rule pursuant to which IOs are immune from suit and every form of judicial process in the United States, subject to the President's unquestioned power to depart from that default rule when he considers it appropriate in light of an IO's functions.

V. ADOPTING PETITIONERS' CONSTRUCTION OF THE IOIA WOULD DRAMATICALLY CHANGE U.S. POLICY

Petitioners' incorrect contentions about U.S. policy concerning IO immunity obscure the severe consequences of adopting Petitioners' construction of the IOIA. As shown by Respondent, IOs have long relied on the immunity from suit and every form of judicial process in the United States that the IOIA confers, subject to the President's discretion. This immunity "is rooted in the need to protect international organizations from unilateral control by a member nation over the activities of the

international organization within its territory." *Mendaro v. World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983). The IOIA was passed to free IOs from these concerns by "protect[ing] the official character of international organizations located in this country," as well as to "strengthen the position of international organizations of which the United States is a member when they are located or carry on activities in other countries." H.R. Rep. No. 79-1203, at 2.

Petitioners' construction, if accepted, would strip IOs of these long-standing protections and subject them to suit and other forms of judicial process in U.S. courts. Were other countries to follow suit, U.S. personnel working for IOs abroad—sometimes in unfriendly nations—would likewise be at risk of being exposed, directly or indirectly, to the jurisdiction of other states' courts. The door would be open wide to unwelcome state interference in the functioning of IOs, especially in countries where those organizations operate.

Writing in 1979, the U.N. warned of exactly this danger: "If any state could, through its courts, bend the operations of an organization to the laws of that state, all other states could do likewise with respect to their laws, thus possibly paralyzing or fragmenting the organization." U.N. *Broadbent Amicus* Br. at 5; *see also* Alice Ehrenfeld, *United Nations Immunity Distinguished from Sovereign Immunity*, 52 Am. Soc'y Int'l L. Proc. 88, 91 (1958); Bekker, *supra*, at 103 ("The uniformity of the organization, which is essential to the performance by the organization of its designated purposes, would be endangered were it forced to defend its actions in the municipal courts of

various States.").

The magnitude of the change Petitioners request is significant. As discussed, incorporating the FSIA's immunity provisions into the IOIA would take IO immunity decision away from the President and place them in the hands of the courts. This would lead to a surge in domestic litigation against IOs that, like this case, have only a tenuous connection to the United States. The Brief of *Amici Curiae* Center for International Environmental Law, *et al.* demonstrates the substantial litigation interest that multiple plaintiffs' counsel have in the outcome of this case.

As Respondent's Brief explains, the Petitioners could not have brought an action in the United States against the Indian corporations directly responsible for the alleged harm. *See* Brief for Respondent at 55. They also could not sue the IFC in India, the country with the greatest interest in this case, because the IFC enjoys immunity from suit there. *See* Indian Ministry of External Affairs Notification No. D-II/451/12(21)/2009, Gazette of India, pt. II sec. 3(ii) (July 13, 2016). Even on Petitioners' theory of the case, they can sue the IFC here only because it is headquartered in Washington. The potential for suits against IOs based solely on the happenstance that they are located in the United States raises serious foreign policy concerns and encourages forum shoppers to flock to U.S. courts.

Petitioners themselves point out that "[m]any international organizations are headquartered in the United States." Brief for Petitioners at 3. If the FSIA

and the restrictive immunity principles it embodies applied to IOs, it is entirely possible that IOs would choose to relocate. The President would also be hampered in his ability to enter into agreements with or regarding new IOs.

This Court has shown restraint when construing laws in ways that would have the judiciary decide issues with important foreign policy implications. *See, e.g., Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 124 (2013); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004). Indeed, in circumstances raising less sensitive foreign policy concerns, the Court has held that the political branches are better placed to make the requisite policy decisions. *See Jesner v. Arab Bank*, 138 S. Ct. 1386, 1407 (2018) (litigation against foreign corporations under the Alien Tort Statute triggers "serious foreign policy consequences" (quoting *Kiobel*, 569 U.S. at 124)). The Court should show that same restraint in this case.

The Court has also warned about the consequences of sudden changes of immunities. *See Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562, 571-73 (1926) ("A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and perceived obligations of the civilized world." (quoting *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812))). The Court should not breach faith where the statutory language lends itself to a simpler approach.

The consequences to IOs, especially those headquartered in the United States, and to U.S. foreign policy interests are too severe to adopt Petitioners' construction. The better approach is to permit the political branches to make any changes to IO immunity law that they may consider warranted.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the decision of the D.C. Circuit.

Respectfully submitted,

PETER R. SHULTS
FOLEY HOAG LLP
155 Seaport Blvd.
Boston, MA 02210
(617) 832-1739
pshults@foleyhoag.com

LAWRENCE H. MARTIN
Counsel of Record
M. ARSALAN SULEMAN
FOLEY HOAG LLP
1717 K Street, N.W.
Washington, D.C. 20006
(202) 261-7395
LHM@foleyhoag.com

APPENDIX

APPENDIX: LIST OF *AMICI CURIAE*

David P. Stewart is Professor from Practice at Georgetown University Law Center. He is President of the American Branch of the International Law Association and a member of the Board of Editors of the *American Journal of International Law*. He was a Co-Reporter for the *Restatement (Fourth), Foreign Relations Law of the United States* (2018) and served for over 30 years as Assistant Legal Adviser in the U.S. Department of State.

Don Wallace, Jr. is Chairman of the International Law Institute, and Professor of Law at Georgetown University Law Center. He has been a U.S. delegate to UNCITRAL since 1980, and he was Chairman of the International Law Section and a member of the House of Delegates of the American Bar Association. He was Deputy Assistant General Counsel and Regional Legal Adviser, Middle East, for the U.S. Agency for International Development, from 1962-66.

Peter H.F. Bekker is Professor and Chair in International Law at the University of Dundee (UK), having previously taught at Columbia Law School as a Lecturer-in-Law. A member of the New York Bar, he is also an advocate before international courts and tribunals. From 1992 to 1994, he served as a legal officer in the Registry of the International Court of Justice in The Hague, The Netherlands. He has also served on the Executive Council of the American Society of International Law. He is the author of *The Legal Position of Intergovernmental Organizations—A Functional Necessity Analysis of Their Legal Status and Immunities* (Martinus Nijhoff Publishers, 1994).

Charles H. Brower II is Professor of Law at Wayne State University. He acted as Advocate for the Government of Costa Rica before the International Court of Justice in Difference Relating to the Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights. He has also served on the Executive Council of the American Society of International Law and the Executive Committee of the Institute for Transnational Arbitration.

Jide Nzelibe is Professor of Law at Northwestern University Pritzker School of Law.

Michael D. Ramsey is Professor of Law and Director of International and Comparative Law Programs at the University of San Diego Law School.

W. Michael Reisman is Myres S. McDougal Professor of International Law at the Yale Law School and has been elected to the *Institut de Droit International*. He was President of the Inter-American Commission on Human Rights of the Organization of American States, Editor-in-Chief of the American Journal of International Law and was elected Honorary President of the American Society of International Law in 2018.

Ernesto J. Sanchez, an attorney in Miami, Florida, is the author of *The Foreign Sovereign Immunities Act Deskbook*, published by the American Bar Association in 2013. His practice focuses on general appellate and international dispute resolution matters.

Anne-Marie Slaughter is the President and CEO of New America, a former President of the American Society of International Law, and the Bert G. Kerstetter '66 University Professor Emerita of Politics and International Affairs at Princeton University. From 2009–2011, she served as director of Policy Planning for the United States Department of State.

Ruth Wedgwood is the Edward Burling Professor of International Law and Diplomacy at Johns Hopkins School of Advanced International Studies.